The Public Servants (Liabilities) Perak Order in Council 1896 is one of the Enactments specified in the schedule. It is contended by Counsel for the appellant that the effect of this Enactment is merely to continue the immunity of public servants against the continuance of actions brought and the bringing of fresh actions in respect of promises made or bond, bills of exchange, promissory note &c. given by a public servant before the passing of the Repeal Enactment and that the rights and powers conferred by section 4 have been extinguished by the Repeal Enactment. I am unable to agree with this contention.

Mr. Dunford Wood has drawn my attention to the General Clauses Amendment Enactment, 1924, which was in operation at the time material to this case, and he contends that by section 3 (d) (ii) and (iv) of the General Clauses Enactment 1897, as amended, the rights, liberties and privileges conferred by section 4 of the Public Servants (Liabilities) Regulation upon public servants have not been affected by the Repeal Enactment No. 17 of 1930 in the absence of an express provision to the contrary in that Enactment.

Now assume for one moment that the Repeal Enactment contained merely a bare repeal of the Enactments specified in the schedule without any saving clause at all. It appears to me in such a case that under the provisions of section 3 (d) (ii) and (iv) of the General Clauses Enactment not only the immunity conferred upon public servants by section 3 of the Public Servants (Liabilities) Regulation would have been preserved but also the rights and privileges conferred upon them by section 4 of that Enactment.

The fact that section 2 of Enactment No. 17 of 1930 specifically saves the immunity of public servants from the maintenance of actions against them cannot in my view be taken to extinguish the rights and privileges of public servants in respect of that immunity conferred upon them by section 4 of the Public Servants (Liabilities) Regulation. To hold otherwise would be reading into the Repeal Enactment something which is not there something which has not been expressly provided as required by the General Clauses Enactment.

In the circumstances I am of opinion that in this case the Magistrate had power to examine into and entertain the application made by the respondent. I consider, however, that the correct order for him to have made was not to set aside the decree but to have made an order discharging the respondent from his liabilities thereunder and from any process, execution or order issued out of any Court in respect thereof.

The appeal must be dismissed and I direct that the order of the Magistrate be varied accordingly. There will be no order as to costs.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

GERAHTY, J.

July 7, 1933.

RE: FONG FUNG LOON
EX PARTE: N. V. R. M. NADERAJAN CHETTIAR

[PERAK BANKRUPTCY No. 64 of 1933]

Bankruptcy—Bankruptcy Notice—Counterclaim exceeding amount of judgment debt and which the judgment debtor could not set up in the action in which judgment obtained—Bankruptcy Enactment, 1912, section 4 (1) (i).

In an action the debtor obtained an order granting him leave to defend conditional upon furnishing security. He appealed against this order, his appeal was dismissed, and he failed to give the security ordered. The creditor obtained judgment against him and issued a bankruptcy notice. *Held*, that the debtor had not an effective counterclaim against the judgment debt, which he could not have set up in the action, since he in fact did set up a counterclaim and was given conditional leave to defend.

S. B. Sinha for the Debtor.

S. K. Das for the Creditor.

Cur. Ad. Vult.

GERAHTY, J.—This is a motion by a judgment debtor to set aside a bankruptcy notice on the ground that he has a counterclaim which exceeds the amount of the judgment debt and which he could not set up in the action in which the decree was obtained *vide* The Bankruptcy Enactment, 1912, section 4 (1) (i).

In the action the debtor made application before the Registrar for an order that he be allowed unconditional leave to appear and defend the suit and for an order to file a counterclaim against the plaintiff. Upon this application the learned Registrar ordered that the defendant be at liberty to appear and defend the suit conditional upon his furnishing security within 14 days. The defendant appealed against this order, but the appeal was dismissed with costs. The defendant failed to give the security ordered but filed a counterclaim.

On the 4th May, 1933, the Registrar gave judgment as prayed holding that as the defendant had failed to give security he was not entitled to go on with his defence or take further steps in the suit.

On the 6th June, 1933, the judgment creditor took out the bankruptcy notice the subject of this motion.

The question is has the judgment debtor a counterclaim which he could not set up in the action in which the decree was obtained in accordance with the provisions of section 4 (1) (i) of the Bankruptcy Enactment?

In my view it would be impossible to hold that the judgment debtor had a counterclaim which he could not set up in the action since he in fact did set up a counterclaim and was given conditional leave to defend. It seems to me that the debtor was afforded ample opportunity to set up his counterclaim and to proceed with it on terms imposed by the Registrar and approved on appeal.

In the case of *In re Isaac. Ex parte Isaac*, (1885) 2 Morr. 258, where the debtor let judgment go by default and then got that set aside and leave to defend on bringing £43 into Court which he did not do, it was held that the debtor could and ought to have set off in the action and that as he had failed to do so he was not within the section. [Bankruptcy Act, 1883, Sect. 4 (1)(g)].

In that case Cave, J., raised the question as to why the debtor could not avail himself of the set off in the action and it was argued that if unconditional liberty to defend had been given to him the debtor could have done so but liberty was only given on condition of bringing £43 into Court. On this argument the learned Judge expressed the view that "that is not what is meant by the words he could not set up! It means when the claim was not then due or something of that kind. There is nothing to show that the condition imposed was not rightly so. There was no appeal against it."

In the matter under consideration there was an appeal and it was held that the condition was rightly imposed.

The interpretation given by Cave, J., to the words "he could not set up" would appear to have been followed in *Re a Debtor*, (1914) 3 K.B. 726 where a debtor after service of a bankruptcy notice on him got an assignment of a debt due from the judgment creditor to a firm of which the debtor was a member and applied to set aside the bankruptcy notice on the ground that he had a counterclaim which he could not set up in the action in which judgment was obtained, it was held that even if the debtor could have obtained the assignment in time to set up the counterclaim in the action, he could not have set it up as matters then stood, and that the notice must be set aside.

I am of opinion in this case that the debtor has not brought himself within the section and that the proceedings in bankruptcy ought not to be stopped.

The motion must be dismissed with costs.

Motion dismissed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J.

July 18, 1933.

K. A. SAIYO APPOOHAMY ..... **Appellant.**

vs.

K. A. ALBERT ..... **Respondent.**

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 24 of 1933]

Civil Procedure Code, 1918, section 328 (i) —Judgment debtor summons—Committal order —Absence of judgment debtor.

A committal order under section 328 (i) of the Civil Procedure Code, should not be made in the absence of the judgment debtor, and the Court should not accept the statement of a judgment-debtor's solicitor as sufficient to warrant such an order.

***Ram Dutt* v. *Mallik* (1931-1932) F.M.S.L.R. 260, distinguished.**

S. C. MacIntyre for the appellant.

L. R. Chandran for the respondent.

Cur. Adv. Vult.

TERRELL, AG. C.J.—On a judgment-debtor summons filed in pursuance of a decree made in Kuala Lumpur Civil Suit No. 360/32, the following is a note of the order made:—

> "The full amount of the claim is to be settled by 21-10-32. Stay of execution will be granted if a suit is filed. In default of payment civil imprisonment until payment of sum due."

At the hearing of the summons the judgment-debtor, the present appellant, was not present but through his counsel, Mr. Lahiri, stated that he was able to pay but was filing a cross suit against the plaintiff-respondent on the present appeal.

The learned Magistrate in his grounds of judgment expressed a doubt as to whether the proceedings were in order, as the judgment-debtor was not himself examined on oath as contemplated by section 327 (i) of the Civil Procedure Code. As to this section 327 (iv) shows that the judgment-debtor need not always be present, and in the case of *Ram Dutt* v. *Mallik (supra)* Mudie, J. held that no further investigation was necessary if the judgment-debtor appeared by counsel and consented to an order. In that case, however, the order made was merely for payment, and it was only on failure to pay that the Court was moved to commit the judgment-debtor.

I am quite satisfied that an order to commit the Judgment-debtor ought not to be made except in his presence. This is not inconsistent with the provisions of section 328 (ii), which provides that on an order for payment by instalments, an order may also be made to commit the judgment-debtor for failure to pay any instalment, because in view of the proviso at the end of the sub-section, no judgment-debtor shall be imprisoned upon such order until he shall have had an opportunity of showing cause: in other words a second application, which should be served personally, is necessary.

The Court of course has power to order that the debtor be arrested and brought before it under section 327 (iv), but this is a very different thing to the civil imprisonment contemplated by sections 328 (i) and 328 (ii).

If then the order made by the learned Magistrate was under section 328 (ii), there would be no objection on the ground that the judgment-debtor was not present, as a further application would be necessary before he could be imprisoned. To my mind, however, the final words of the order make it clear that it was made under section 328 (i), i.e. it is an order for imprisonment which is merely suspended for one week. That being the case, I think that no such order should have been made in the absence of the judgment-debtor, and that the Court should not accept a statement of a man's solicitor as sufficient to warrant an order of that kind.

I also think that the fact that the term of imprisonment is not specified is fatal. The Magistrate only had power to order imprisonment